HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number:	S98/2022
File Title:	Unions NSW & Ors v. State of New South Wales
Registry:	Sydney
Document filed:	Defendant's Supplementary Submissions
Filing party:	Defendant
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S98 of 2022

BETWEEN:

Unions NSW
First Plaintiff

New South Wales Nurses and Midwives' Association
Second Plaintiff

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Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales
Third Plaintiff

New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Unions
Fourth Plaintiff

and

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State of New South Wales
Defendant

DEFENDANT'S SUPPLEMENTARY SUBMISSIONS

Part I: Internet publication

1. These submissions are in a form suitable for publication on the internet. They are filed pursuant to leave granted on 4 November and respond to [10]-[12] of the plaintiffs' reply submissions filed on 8 November (**PR**), concerning the repeal of s 35.

Part II: Repeal of section 35: implications for utility of the proceeding

2. The defendant's submissions filed on 26 October 2022 addressed the law in force at the time: s 35 applied to by-elections by reason of s 29(11) and did not apply to general elections in the absence of an expenditure cap. The proceeding was prepared for urgent hearing upon a prudential assumption that an expenditure cap would be legislated for the general election and engage the operation of s 35: T 4.67–85 ([2022] HCATrans 142, 26 August 2022). Due to the course of proceedings in Parliament, the legislation which commenced on 2 November 2022 not only imposed an expenditure cap for the general election (which is not challenged) but also repealed s 35—a result which the plaintiffs have been advocating and are at pains to prove the government opposed. Section 35 has no continuing operation, for general elections or by-elections.

3. Why, then, should this Court hear and determine the plaintiffs' challenge to the repealed provision? That challenge was prepared for hearing on an assumption that no longer holds. The plaintiffs advance three reasons, none of which should be accepted.

4. Historical compliance with s 35 (PR [10]): This is not a case where there is any suggestion of historical *non-compliance* with s 35 (the subject of apprehended enforcement action). The plaintiffs submit, rather, that they have complied with s 35 and are concerned to know if they complied unnecessarily with an invalid law. Any such concern is a mere intellectual or emotional concern insufficient to sustain a judicial proceeding. Whether the plaintiffs' compliance with the law was necessary or unnecessary is an academic question. No practical consequences can flow.

5. Fear of "reintroduction" (PR [11]): The plaintiffs assert a fear that the State may "reintroduce" a "materially similar" provision as s 35. The asserted fear rises no higher than what anyone might assert at any time about the possibility of future legislation on any topic. To the extent the fear is grounded on statements made in Parliament, the plaintiffs do not explain how they can, consistent with Parliamentary privilege, use those statements against the government and invite the Court to draw inferences about states of mind or intentions of members of the government. In any event, the government's opposition to the repeal is an insufficient basis to sustain the proceeding. If the government wanted to pass a Bill through the Parliament but was unable to do so, there would be no justiciable matter as

to the validity of the Bill just because it had been proposed. This is an *a fortiori* case — there is no proposal to enact s 35.

6. To the extent the fear is grounded in the State's refusal to give undertakings, that refusal is consistent with a range of possibilities other than an intention to reintroduce s 35. It is entirely reasonable for a government not to give undertakings that would fetter it or future governments as to the legislation that may or may not be introduced. In any event, the relief sought is a declaration as to the validity of s 35 when it was in force. Plainly, the Court could not be asked to rule on the validity of speculative forms of future legislation that might be "materially similar" to s 35. Ruling on the validity of an historical provision, particularly one that raises difficult questions of construction, could not quell any controversy about such future possibilities.

7. **Costs (PR [12])**: The dispute about the costs of the proceeding is not a basis on which the Court would determine the merits of the challenge to s 35. The usual position is that there be no order as to costs, unless a party has acted unreasonably or in a rare case where it is clear that one party would inevitably have succeeded: *Ex parte Lai Qin* (1997) 186 CLR 622 at 624-625. The premise of these established costs principles is that the Court will not conduct a merits hearing for the purpose of determining costs.

8. **Matter / Discretion**: The above considerations are questions of utility, which the plaintiffs accept go to the exercise, if not the existence, of judicial power (PR [11]). Utility should be understood in an appropriate case, like standing, as being "subsumed" within the concept of a "matter". If relief ceases to have utility during the course of a proceeding, the scope of the justiciable matter may contract. If, alternatively, the matter continues in its original scope, inutility of relief is a compelling reason not to grant that relief in any event.

9. This Court should not set a precedent that it will determine the validity of repealed legislation (or hypothetical future legislation) to satisfy a plaintiff's academic desire to know whether it was valid, or because a plaintiff fears that a similar provision might be enacted in the future, or because a plaintiff seeks to sidestep *Lai Qin* on a question of costs.

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